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Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FLEETWOOD HOMES OF FLORIDA AND CRAWFORD & COMPANY,
Petitioners,

v.

KENNETH S. APFEL, Commissioner of Social Security,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit erred in finding that Petitioners are precluded from being parties to a social security hearing under 42 U.S.C. 405(b)(1) and 20 C.F.R. 404.932(b) because petitioners are not "individuals" or "persons" under the Social Security Act.

PARTIES TO PROCEEDING

Pursuant to Rule 14.1(b), the parties to the proceedings before the United States Court of Appeals for the Eleventh Circuit are FLEETWOOD HOMES OF FLORIDA; CRAWFORD & COMPANY; and KENNETH S. APFEL, Commissioner of Social Security.

CORPORATE DISCLOSURE STATEMENT

FLEETWOOD ENTERPRISES, INC. is the parent corporation in this case. There is no publicly held company that owns 10% or more of this corporation's stock. CRAWFORD & COMPANY is the Florida servicing agent for FLEETWOOD ENTERPRISES, INC.

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JURISDICTIONAL STATEMENT

A. The Order from the United States Court of Appeals for the Eleventh Circuit was entered on December 14, 2000.

B. This Court has jurisdiction to review on a Writ of Certiorari the Order in question, pursuant to 28 U.S.C. §1254.

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Statutes

42 U.S.C. §405(b)(1) . . Appendix C

42 U.S.C. §405(g) . . . . Appendix C

Regulation

20 C.F.R. 404.932

(b) ***Who are parties to a hearing.*** After a request for a hearing is made, you, the other parties to the initial, reconsidered, or revised determination, and any other person who shows in writing that his or her rights may be adversely affected by the hearing, are parties to the hearing. In addition, any other person may be made a party to the hearing if his or her rights may be adversely affected by the decision, and the administrative law judge notifies the person to appear at the hearing or to present evidence supporting his or her interest.

STATEMENT OF THE CASE

On August 19, 1994, DEBRA SCOTT (hereinafter "Scott") was injured in the course and scope of her employment while working for FLEETWOOD HOMES OF FLORIDA. FLEETWOOD HOMES and CRAWFORD & COMPANY, INC. ("Petitioners") provided workers' compensation benefits to Scott pursuant to Florida law.

Scott subsequently filed an application for social security disability benefits. In 1996, Petitioners filed a Motion to Intervene in Scott's social security disability case, because a favorable finding by the Administrative Law Judge ("ALJ") could adversely affect Petitioners.

On July 11, 1996, the ALJ entered an Order denying Petitioners' Motion to Intervene. Petitioners then filed a Petition for Review with the United

States District Court, Middle District of Florida, Orlando Division, on August 9, 1996. On August 18, 1997, the presiding United States Magistrate Judge, James G. Glazebrook, entered a Report and Recommendation, recommending that the action be dismissed without prejudice for lack of jurisdiction as there was no final order. Judge Glazebrook held that a decision is not final until the movant has obtained a decision from the Appeals Council. At that time, the Appeals Council had not yet ruled on Petitioners' Request for Review of the ALJ's Decision.

On December 30, 1997, the presiding Administrative Appeals Judge, John G. Wojciechowski, entered an Order dismissing Petitioners' Request for Review on the grounds that Petitioners were not proper parties to Scott's social security case. On January 23, 1998, Petitioners filed a

second Petition for Review with the United States District Court, Middle District, Orlando Division. The Commissioner of Social Security ("Commissioner") filed a Motion to dismiss the Petition for lack of standing and lack of subject matter jurisdiction. The Magistrate Judge recommended that the motion be granted on the basis that 42 U.S.C. §405(g) did not confer jurisdiction on the court. The Magistrate Judge found that Petitioners did not have jurisdiction because Petitioners were not individuals under 42 U.S.C. §405(b)(1).

On June 26, 1998, Petitioners filed a Memorandum of Law in Opposition to the Report and Recommendation of the Magistrate Judge, which was treated as a Motion for Rehearing, to the United States District Court, Middle District, Orlando Division. In the Memorandum

of Law in Opposition, Petitioners argued that the Magistrate Judge's ruling was contrary to Califano v. Yamasaki, 99 S.Ct. 2545 (1979) and Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois v. Richard Schweiker, 715 F.2d. 282 (7th Cir. 1983). On July 9, 1998, United States District Court Judge Kendall G. Sharpe rejected the Magistrate Judge's Report and Recommendation. Judge Sharpe reviewed Petitioners' Memorandum of Law in Opposition and found that Petitioners were proper parties to Scott's social security case. On November 30, 1998, Judge Sharpe signed an Order granting entry of Final Judgment.

On January 28, 1999, Commissioner filed a Notice of Appeal with the United States Court of Appeals for the Eleventh Circuit. On December 14, 2000, the United States Court of Appeals for the Eleventh Circuit

entered an Order reversing the District Court's decision. The Eleventh Circuit first found that they had jurisdiction to hear the issue on appeal under the collateral order doctrine. The Eleventh Circuit subsequently found that the issue on appeal was not moot. Turning to the merits of the appeal, the Eleventh Circuit found that petitioners were not individuals under 42 U.S.C. §405(b)(1) and 20 C.F.R. §404.932(b). The Eleventh Circuit found that since petitioners were corporate entities, they were not the individuals or persons enumerated by the Social Security Act or Regulations with a potential stake in the award of social security benefits to a particular claimant. As a result, the Eleventh Circuit found that Petitioners were not proper parties to Scott's social security hearing.

ARGUMENT

The United States Court of Appeals for the Eleventh Circuit erred in finding that Petitioners are precluded from being parties to a social security hearing under 42 U.S.C. 405(b)(1) and 20 C.F.R. 404.932(b) because petitioners are not "individuals" or "persons" under the Social Security Act.

The Eleventh Circuit found that Petitioners were precluded from being parties in Scott's social security case because Petitioners were not the individuals or persons enumerated by the Act or Regulations with a potential stake in the award of social security benefits. Petitioners contend that the Eleventh Circuit's decision conflicts with this Court's decision in Califano v. Yamasaki, 99 S.Ct. 2545 (1979) and the Seventh Circuit's decision in Attorney Registration and Disciplinary Commission v. Schweiker, 715 F.2d. 282 (7th Cir. 1983). In these cases, this

Court and the Seventh Circuit broadly construed the word "individual" to include entities similar to Petitioners.

In Califano, a class action was brought against the Secretary of the Department of Health, Education and Welfare because the Secretary was recouping overpayments of social security benefits. The District Court in Washington certified a nationwide class action and enjoined the Secretary from recouping benefits without the opportunity for a hearing. The United States Court of Appeals for the Ninth Circuit upheld the Order approving class certification.

The Secretary filed a Petition for Writ of Certiorari with this Court. The Secretary relied on the language of 42 U.S.C. §405(g) which authorizes suit by "any individual". The Secretary argued that this language contemplated a case by case

adjudication of social security claims that is incompatible with class relief. This Court rejected the Secretary's argument, holding that class action relief was appropriate. This Court held that "individual" under 42 U.S.C. §405(g) could be broadly construed to include a class action. See Califano, 442 U.S. at 700-701.

In Schweiker, the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois brought a complaint on its own behalf and on behalf of all Commission employees against Richard Schweiker, the Secretary of Health & Human Services. The complaint challenged the denial of social security benefits to Commission employees. The Secretary filed a Motion to Dismiss the Commission's Complaint for lack of jurisdiction under 42 U.S.C. §405(g). The United

States District Court for the Northern District of Illinois granted the Secretary's Motion to Dismiss for lack of jurisdiction.

The United States Court of Appeals for the Seventh Circuit reversed the District Court's decision. In reversing the District Court's decision, the Seventh Circuit stated that, "The hard question is whether the Commission is 'an individual' within the meaning of §405(g)." See Schweiker, 715 F.2d at 289. The Seventh Circuit relied on this Court's decision in Califano to find that the Commission was an individual. Id.

United States Supreme Court Rule 10(a) states that this Court will consider review on a Writ of Certiorari if the United States Court of Appeals has entered a decision in conflict with a decision of another United States Court of Appeals on the same important matter. United States

Supreme Court Rule 10(c) states that this Court will consider review on a Writ of Certiorari if a United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. As shown above, both rules apply in this case.

Judge Sharpe, the District Court Judge in this case, reviewed Califano and Schweiker and found that Petitioners were proper parties under the Social Security Act. However, the Eleventh Circuit narrowly construed the words "individual" and "person" to exclude Petitioners. The Eleventh Circuit cited no prior authority for such a narrow construction of these words. As shown above, the only Social Security Act cases interpreting these words defined "individual" in broader terms.[1] In virtually every

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[1] In addition to Califano and Schweiker, a United States District Court in

other area of the law, words such as "individual" and "person" have been construed to include corporations.

The Eleventh Circuit's decision conflicts with this Court's interpretation of "individual". The Eleventh Circuit's decision conflicts with the Seventh Circuit's interpretation of "individual". Since the Eleventh Circuit's decision conflicts with a prior decision of this Court and a prior decision of the Seventh Circuit, Petitioners request that this Court consider review on the

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Massachussetts implicitly held that the entire Commonwealth of Massachussetts was an individual entitled to intervene in a class action lawsuit filed by various individuals against the Secretary of Health and Human Services for allegedly terminating their social security disability benefits. Avery v. Heckler, 584 F.Supp. 312 (U.S.D.C. Mass. 1984) aff'd, 762 F.2d 158 (1st Cir. 1985). Although the District Court did not directly address the issue presented in this case, the District Court found that plaintiffs had jurisdiction under 42 U.S.C. §405(g) and that the Commonwealth of Massachussetts was entitled to intervene in the social security claim.

Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Petitioners request that the Petition for Writ of Certiorari be granted.

Respectfully submitted this _____ day of _____, 2001.

_____

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[PUBLISH]

(SEAL)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-2201

D.C. Docket No. 98-00065-CV-ORL-18C

CRAWFORD & COMPANY,
FLEETWOOD HOMES OF FLORIDA,

Plaintiffs-Appellees,

versus

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant-Appellant.

Appeal from
the United States District Court
for the Middle District of Florida

(December 14, 2000)

Before ANDERSON, Chief Judge,
DUBINA and HILL, Circuit Judges.

HILL, Circuit Judge:

The merits of this appeal present a novel issue of first impression under Title II, 42 U.S.C. §405, of the Social Security Act (Act) and its applicable regulations, 20 C.F.R. §§404.932 and 416.1432.[1] The merits of the federal law issue presented in this case are juxtaposed against the backdrop of a state statute, Florida's Workers' Compensation Law, Fla.Stat. Ch. 440 (1994).

The Commissioner of Social Security (Commissioner) appeals from an eighteen-word handwritten order of the district court. By this squib notation, written in the left-hand

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[1] Congress has given the Commissioner of Social Security (Commissioner) full power and authority to make regulations and establish procedures not inconsistent with the Act, which are necessary or appropriate to carry out the statute. *See* 42 U.S.C. §405(a). Pursuant to his authority, the Commissioner has promulgated regulations establishing who may request a hearing and who may be a party to a hearing. *See* 20 C.F.R. §§404.932; 416.1432.

margin of the report and recommendation (R&R) of the magistrate judge, the district court rejected the R&R, finding that the court had subject matter jurisdiction and that the plaintiff corporations could intervene as proper parties to an individual claimant's social security disability hearing.[2] For the following reasons, we reverse the decision of the district court.

I. Factual Background

The underlying facts are not in issue and are pertinent only to set the stage for this appeal. In 1994, Deborah D. Scott, while employed by Fleetwood Homes of Florida (Fleetwood) as an assistant foreman, was injured on the job.[3] In 1995, Scott filed an

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[2] Corporate plaintiffs are identified as the claimant's former employer and its workers' compensation insurance carrier.

[3] Scott fell through an open duct in the bathroom floor of a mobile home, injuring her left leg, pelvic area, back

application for federal social security disability insurance benefits and an application for supplemental security income.[4] She also filed a state claim in Florida for workers' compensation seeking permanent total disability (PTD) benefits.

II. Procedural Background

The underlying procedural background of this appeal is germane. In 1996, Fleetwood, and Crawford & Company, Inc. (Crawford), described as Fleetwood's workers' compensation insurance carrier, filed a motion to intervene in Scott's social security disability case, pending before an Administrative Law Judge (ALJ). They contended that their rights would be "adversely affected" by the decision of the ALJ making them proper parties

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and neck.

[4]. Scott's supplemental security income claim was subsequently denied. This appeal only concerns her application for disability benefits.

to the hearing under 20 C.F.R. §404.932(b).[5] They argued that Scott might, without their presence in the federal forum, receive a finding of "catastrophic injury" from the ALJ. This ruling could in turn be relied upon by the Florida Judge of Compensation Claims (JCC) to support an award of PTD benefits in the state forum, payable by responsible parties Fleetwood and Crawford to Scott, perhaps for the rest of her life.[6]

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[5] This regulation states in part that "[a]fter a request for a hearing is made, you [the claimant], the other parties to the initial, reconsidered, or revised determination, *and any other person who shows in writing that his or her rights may be adversely affected by the hearing*, are parties to the hearing." 20 C.F.R. §404.932(b) (emphasis added); *see also* note 22 *supra* for the entire text.

[6] In defining PTD benefits, Florida law provides that "[o]nly a catastrophic injury as defined in s. 440.02 shall, in the absence of conclusive proof of a substantial earning capacity, constitute permanent total disability. *Only claimants with catastrophic injuries are eligible for permanent total benefits. In no other case may permanent total disability be awarded.*"

Using a rationale supported by Fed.R.Civ.P. 24, the ALJ found that Fleetwood and Crawford were not proper parties to Scott's hearing, and denied their motion to intervene.[7] He

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Fla.Stats. §440.15(b) (1994) (emphasis added).

Turning to §440.02(37)(f), applicable for purposes of this appeal, "Catastrophic injury" means "[a]ny other injury *that would otherwise qualify under this chapter of a nature and severity that would qualify an employee to receive disability income benefits under Title II* [42 U.S.C. §401 *et seq.*] . . . of the federal Social Security Act as the Social Security Act existed on July 1, 1992, without regard to any time limitations provided under that act." Fla.Stats. §440.02(37)(f) (1994) (emphasis added).

[7] Other reasons offered by the ALJ were: that Fleetwood and Crawford had no interest in Scott's federal case; that there was no question of law or fact in common between them and Scott's federal case; that entitlement to coverage under federal law was dissimilar to coverage under the state statute (*i.e.*, federal disability must be total, while state disability could be permanent or temporary, permanent or partial); and that Scott's privilege to have her medical records kept confidential would be breached by Fleetwood and Crawford's tender of such records in her federal case.

reasoned that, under Florida law, it was not mandatory, only discretionary, for a JCC to consider a decision by an ALJ. Therefore, the outcome of Scott's federal case was not legally binding, nor necessarily even considered, in her state case. The ALJ concluded that Fleetwood and Crawford would have an opportunity to protect their interest in Scott's state case; this was their sole remedy.

Fleetwood and Crawford then filed its first petition in district court challenging the ALJ ruling. The magistrate judge dismissed their petition for lack of jurisdiction on the basis that there was no final decision to review.[8] Upon motion for reconsideration, the magistrate judge reconfirmed its original disposition,

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[8] All parties consented to a final disposition before a United States Magistrate Judge.

granting Fleetwood and Crawford leave to seek review by the Appeals Council of the Social Security Administration (SSA) in order to exhaust their administrative remedies and to obtain a final decision of the Commissioner.

So Fleetwood and Crawford filed a petition for review with the Appeals Council. Finding that Fleetwood and Crawford had "not claimed any benefits or other rights provided under Title II or XVI of the Act and ha[d] not established that such rights would be adversely affected," the Appeals Council dismissed their request for review "because they [were] not a proper party" under the regulations. *See* 20 C.F.R. §§404.932; 416.1432.[9]

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[9] The Appeals Council noted that Fleetwood and Crawford were not Scott's appointed representative; that, with respect to benefits, their rights were not adversely affected by the decision of the ALJ; that they were not a party to the ALJ decision; and that they would not be adversely affected by any decision the Appeals Council might make.

Now armed with a final decision, Fleetwood and Crawford returned to district court with a second petition for review pursuant to 42 U.S.C. §405(g).[10] The Commissioner filed a motion to dismiss the petition for lack of standing and lack of subject matter jurisdiction. The magistrate judge recommended that the motion be granted on the basis that §405(g) did not confer jurisdiction upon the court.

Citing §405(b)(1)[11], he stated:

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[10] Section 405(g), entitled "Judicial review" provides in pertinent part: "Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action . . . Such action shall be brought in the district court of the United States . . . ."

[11] Section 405(b)(1) provides in relevant part:

> . . . Upon request by *any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife,*

> Petitioners are corporations, not individuals. Congress has taken great care to specifically name each individual who may seek an administrative determination of entitlement to disability benefits . . . Because Congress limited benefit determinations to individuals . . . Congress had no need to allow anyone other than an individual to seek judicial review of the Commissioner's final decision . . . [It] did not allow corporations to seek judicial review from the Commissioner's decision that [Fleetwood and Crawford] are

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> *surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child or parent who makes a showing in writing that his or her rights may be prejudiced by any decision* the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision . . . .

42 U.S.C. §405(b)(1) (emphasis added); *see also* 20 C.F.R. §§404.932(b); 416.1432(b).

> not proper parties to a hearing because Congress envisioned only listed individuals as requesting, or intervening in, hearings.

In a footnote, the magistrate judge noted that, from examining the record, there was no indication: (1) that the Florida JCC would be bound to follow the determination of the Commissioner, nor (2) that the Florida JCC would not allow Fleetwood and Crawford an opportunity to present their evidence in the state workers' compensation proceeding.

The district court rejected the R&R by this handwritten notation: "The recommendation is rejected. The Court finds that plaintiffs are proper parties and therefore have subject matter jurisdiction." In response to the Commissioner's motion to clarify, the district court again made a handwritten notation across the top of the motion: "Granted. The Court's

decision was based on the memo in opposition to the magistrate R&R [filed by Fleetwood and Crawford and treated as a motion for rehearing]." Six weeks later, the ALJ determined that Scott was entitled to social security disability benefits. The district court stamp-granted Fleetwood and Crawford's motion for final judgment, with the hand-written notation across the top: "Final Judgment. Petitioners are proper parties." The Commissioner filed this appeal.

III. ISSUES ON APPEAL

Three issues are presented on appeal:

A. Whether the 'Final Judgment' of the district court finding that Fleetwood and Crawford are proper parties to Scott's social security disability hearing is immediately appealable?

B. If the order is immediately

appealable and this court has jurisdiction, whether this appeal is moot, as Scott's state workers' compensation proceeding is now final?

C. If this appeal is not moot, whether Fleetwood and Crawford are proper parties under the Act and applicable regulations to Scott's social security disability hearing before the ALJ?

IV. STANDARD OF REVIEW

The decisions by the district court that subject matter jurisdiction was present, 42 U.S.C. §405(g), to review the final decision of the Commissioner that Fleetwood and Crawford were not proper parties to Scott's social security disability hearing, 42 U.S.C. §401(b)(1), raise pure questions of law that we review *de novo*. *Federal Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1238 (11th Cir. 2000).

V. DISCUSSION

A. Jurisdiction

We raised the issue of jurisdiction *sua sponte*. The parties responded in supplemental briefings.

The jurisdiction of this court in social security proceedings is limited to final orders of the district courts. 28 U.S.C. §1291. A final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute its judgment." *Huie v. Bowen*, 788 F.2d 698, 701 (11th Cir. 1986) (citations omitted). Generally, an order of a district court remanding a case to the Commissioner is not an appealable order.[12] *Id.* However, the Supreme

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[12]. The SSA was established in 1994 as "an independent agency in the executive branch," 42 U.S.C. §901(a), "to administer the old-age, survivors, and disability insurance program[s]," 42 U.S.C. §901(b). Previously, the SSA had administered these programs under the auspices of the Department of Health and Human Services. 42 U.S.C. §901 *note*. Hence, some of the older cases refer to the Secretary of the Department of Health and Human Services

Court has held a judgment of the district court that reverses the decision of the Commissioner and orders a remand to the SSA is final and appealable under §1291 when entered under the fourth sentence of §405(g).[13] *Forney v. Apfel*, 118 S.Ct. 1984, 1986-87 (1998).

The Commissioner argues that jurisdiction is present under the fourth sentence of §405(g). Fleetwood and Crawford argue it is not, although both sides appear to agree that this is a jurisdictional issue of first

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instead of the Commissioner of the SSA. *See Biddle v. Heckler*, 721 F.2d 1321 (11th Cir. 1983).

[13] The fourth sentence of §405(g) provides that "[t]he court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."

impression.[14] We need not address whether jurisdiction is present under §405(g), as we conclude, after reviewing the briefs of the parties, that the precedential authority of this circuit establishes that the judgment of the district court, even if not "final" *per se*, is reviewable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 69 S.Ct. 1221 (1949). *Huie*, 788 F.2d at 701-02. "[T]he *Cohen* doctrine allows appeals to be taken from orders that (1) finally determine claims entirely collateral to and separable from the substance of other claims in the action, (2) require review because

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[14] Somewhat incompatible with their jurisdictional position, however, Fleetwood and Crawford agree with the Commissioner that the merits of their claim present an important question as "there is a vital need for this Court to address whether employers and carriers can intervene in an applicant's social security hearing, and the extent to which employers and carriers can participate in the applicant's social security hearing."

they present significant, unsettled questions, and (3) cannot be reviewed effectively once the case is finally decided." *Id.*

This appeal satisfies all three prongs of *Cohen*. First, the issue of whether third-party corporations not claiming benefits may participate in an individual claimant's disability hearing is a structural matter unrelated to the merits of the individual's disability claim. *Id.* Second, the issue is important as the broad mandate of the district court would create a fundamental change in the social security disability hearing and would be unprecedented in nature.. *Id.* Third, the issue would be otherwise unreviewable.[15] *Id.* We

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[15] If the remand decision is to award benefits, the procedural issue is moot. However, if the remand decision is to deny benefits, Scott could appeal on the basis of both the merits and the procedural issue. The review of an important issue of first impression should not depend upon the

therefore find jurisdiction present under the *Cohen* collateral order doctrine.

B. Mootness

We now turn to the issue of mootness. Again *sua sponte*, during oral argument the court inquired as to whether or not this appeal was now moot, as Scott's workers' compensation claim had concluded. The parties also addressed the issue in supplemental briefings.

As we know, Scott filed a claim under Florida workers' compensation law seeking PTD benefits. The JCC in the state proceeding awarded PTD benefits to Scott. Fleetwood and

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discretion of a private party. *See Matthews v. Eldridge*, 96 S.Ct. 893, 896-97 n.11 (1976) (where, in a social security context, the Supreme Court stated that "the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered").

Crawford appealed the decision of the JCC to the Florida First District Court of Appeal on June 9, 2000, the First District Court of Appeal affirmed the order of the JCC per curiam without opinion. *Crawford & Co. v. Scott*, 767 So.2d 1205 (Fla. 1st DCA 2000).

The decision by the Florida district court does not moot the merits of this appeal as Florida law provides for modification of a JCC order. Under Fla.Stat. §440.28 (1994), at any time prior to two years after the date of the last payment of compensation made pursuant to the compensation order a party seeks to modify, on the ground of a change in condition or because of a mistake in a determination of fact, a JCC may review a compensation case and issue a new compensation order which may terminate, continue, reinstate,

increase or decrease the award.[16] Also, Scott's social security disability case is still in active status, as the ALJ recommended that she be reevaluated in one year (although this time has now passed) and referred for vocational rehabilitation services. 20 C.F.R. §416.1710; 1715; and 404.2101. Hence the claim of Fleetwood and Crawford is not moot and the issue of intervention continues.

C. The Merits of the Appeal

We now turn to the underlying merits of the case. The net effect of the district court order will be to require Scott's case to be reopened by the ALJ, in order to conduct a second

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[16] The Commissioner argues that Fleetwood and Crawford's claim of a right to intervene has been rendered moot for lack of injury. *See Atlanta Gas Light Co. v. F.E.R.C.*, 140 F.3d 1392, 1401 (11th Cir. 1998) (where "[a] case becomes moot 'when . . . the parties lack a legally cognizable interest in the outcome'").

hearing. The Commissioner contends that this rehearing will be adversarial in nature, with Fleetwood and Crawford as opposing parties to Scott. Fleetwood and Crawford argue that although their rights are adversely affected by Scott's social security disability hearing, their intervention would not render the hearing adversarial. On the contrary, they claim it would develop and supplement the record in order to promote fair and objective evaluation of claims, and efficient determination of eligibility for benefits.[17]

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[17] Here, Fleetwood and Crawford assert, that there is no other party to Scott's hearing that can adequately represent their viewpoint with regard to conflicting medical evidence. They contend that all employers and carriers should be allowed to participate in the discovery process by presenting medical records, surveillance evidence, rehabilitation reports, depositions of treating physicians, employer documents regarding job availability, and vocational evaluations of an individual's ability to return to gainful employment.

Social security disability proceedings are inquisitorial rather than adversarial. *See Sims v. Apfel*, 120 S.Ct. 2080, 2085 (2000) (citing *Richardson v. Perales*, 91 S.Ct. 1420 (1971)). The SSA is perhaps the best example of an agency that is not based to a significant extend on the judicial model of decisionmaking. It has replaced normal adversary procedure with an investigatory model, where it is the duty of the ALJ to investigate the facts and develop the arguments both for and against granting benefits; review by the Appeals Council is similarly broad. *Id.*[18] The regulations also make the nature of the SSA proceedings quite clear. They expressly provide that the SSA "conducts the administrative

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[18]. Intervention, claims the Commissioner, would greatly deserve the average disability claimant, typically unrepresented by counsel, facing and confronting presumably well-represented corporate adversaries at this juncture.

review process in an informal, nonadversary manner." 20 C.F.R. §404.900(b). The Commissioner has no representative before the ALJ to oppose the claim for benefits; neither is there any indication that he opposes claimants before the Appeals council. *Sims*, 120 S.Ct. at 2085 (citing Dubin, *Torquemado Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L.Rev. 1289, 1301-05, 1325-29 (1997)).

Next, the Commissioner contends that the statute and regulations should be construed to limit participation to individuals and not corporate entities and that his reasonable interpretation is entitled to deference. *See Thomas Jefferson Univ. v. Shalala*, 114 S.Ct. 2381, 2386-87 (1994). As the regulations speak in terms "you" and "other parties" in referring to individual

human beings, the term "any other person" should be similarly construed. This conclusion is buttressed by the use of the terms "his" and "her." *See City of Delray Beach, Fla. v. Agricultural Ins. Co.*, 85 F.3d 1527, 1534 (11th Cir. 1996) (applying the doctrine of statutory construction "ejusem generis").

Fleetwood and Crawford assert that the Commissioner's statutory interpretation of the word "individual" to mean only human beings and not businesses is incorrect. They claim they have a right to be a party in Scott's hearing because they are "any other person who shows . . . that his or her rights may be adversely affected by the hearing, *are* parties to the hearing." 20 C.F.R. §404.932(b) (emphasis added).[19]

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[19] Fleetwood and Crawford rely on two decisions interpreting the word "individual" in a §405(g) context. In *Califano v. Yamasaki*, 99 S.Ct. 2545 (1979),

Under the Act, the statutory provisions governing hearings in disability cases contemplate participation by only individuals with a stake in obtaining benefits.[20] The

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a class action was brought against the Secretary of the Department of Health, Education and Welfare to recoup insurance overpayments by decreasing future benefits. The Secretary argued class relief was inappropriate using the definition of "individual" under §405(g). The Supreme Court disagreed with this narrow interpretation. Similarly, in *Attorney Registration and Disciplinary Comm'n v. Schweiker*, 715 F.2d 282 (7th Cir. 1983), the Commission brought suit against the Secretary of Health and Human Services seeking a declaration that their employees were covered by social security or a refund. The Seventh Circuit held that the Commission was an "individual" within the meaning of §405(g) entitled to judicial review of an administratively final decision. *Id.* at 289.

[20] Section 405(b)(1) provides:

> (b) **Administrative determination of entitlement to benefits; findings of fact; hearings; investigation; evidentiary hearings in reconsiderations of disability benefit terminations; subsequent applications**
> (1) The Commissioner of Social Security is directed to make

findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. Any such request with respect to such a

statute speaks in terms of "individuals applying for a payment," "his or her rights," such individual or upon request by a wife, divorced wife, widow . . . ." Section 405(b)(1). The applicable regulations governing who may request a disability hearing are 20 C.F.R. §§404.923(a) and

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decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

416.1432(a).[21] The applicable regulations governing who are parties to a disability hearing are §§404.923(b) and 416.1432(b).[22] As

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[21] According to the regulations, the following may request a hearing before an ALJ:

> (a) **Who may request a hearing.** You may request a hearing if a hearing is available under §404.930. In addition, *a person* who shows in writing that *his or her rights may be adversely affected* by the decision may request a hearing.

20 C.F.R. §§404.932(a); 416.1432(a) (emphasis added).

[22] According to the regulations, the following may be parties to a hearing before an ALJ:

> (b) **Who are parties to a hearing.** After a request for a hearing is made, you, the other parties to the initial, reconsidered, or revised determination, *and any other person who shows in writing that his or her rights may be adversely affected by the hearing*, are parties to the hearing. In addition, any other person may be made a party to the hearing if his or her rights may be adversely affected by the decision, and the administrative

corporate entities, it is clear that Fleetwood and Crawford are not the individuals or specified persons enumerated by the Act or regulations with a potential stake in the award of social security benefits to a particular claimant. As a result, under the law, they are not proper parties to Scott's federal hearing. *Id.*

Fleetwood and Crawford suggest, that in 1994, when the Florida Legislature changed the standard for awarding PTD benefits to include "any [catastrophic] injury that would otherwise qualify . . . of a nature and severity that would qualify an employee to receive disability income benefits under Title II," Fla.Stats.

> law judge notifies the person to appear at the hearing or to present evidence supporting his or her interest.

20 C.F.R. §§404.932(b); 416.1432(b) (emphasis added).

§440.02(37)(f), employers and insurance carriers alike recognized the importance of the claimant's award or denial of social security benefits by an ALJ. It was then, Fleetwood and Crawford contend, that employers and carriers began filing motions to intervene with ALJs.[23]

The JCC in this case held that she had "considered whether the Claimant has sustained a catastrophic injury which would entitle her to receive disability income benefits under Title II or Supplemental security Income Benefits under Title XVI Social Security Act . . . ." She found that "the Claimant's injuries . . . are of such a nature and severity that they would qualify this Claimant to receive disability income benefits [under

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[23] They claim that "[v]irtually all of the Motions to Intervene filed by employers and carriers have either been ignored or simply discarded by the Administrative Law Judges."

either Title]." In her opinion, the JCC makes no reference to the prior decision of the ALJ to award benefits. It appears clear from the record that the JCC applied social security standards yet made her own independent findings. This is in accordance with Florida case law.[24] Most recently, in

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[24]. *See also Alachua County Adult Detention Center v. Alford*, 727 So.2d 388, 391 (Fla. 1st DCA 1999) (where the court upheld the refusal of the JCC to stay payment of PTD benefits pending review of an application for modification, based on the fact that the SSA had reached a different conclusion, as the employer/carrier made no showing that the Florida legislature intended to delegate the authority of the JCC to the SSA); *Union Camp Corp. v. Hurst*, 696 So.2d 873, 876 (Fla. 1st DCA 1997) ("[w]hile receipt of social security disability benefits may be relevant to a determination of entitlement to PTD benefits under the definition of catastrophic injury . . . in section 440.02(34)(f)[sic] . . . , claimant's receipt of SSD benefits alone is not sufficient to qualify him for PTD benefits. The claimant must still prove every element of his claim, including . . . a causal connection between his compensable injury and the inability to earn which has entitled him to receive SSD benefits."); *Bob Wilson Dodge v. Mohammed*, 692 So.2d 287, 288 (Fla. 1st DCA 1997) (claimant

Florida Distillers v. Rudd, 751 So.2d 754 (Fla. 1st DCA 2000), the court stated:

> Nevertheless, despite the statutory intent to render PTD status comparable to disability under the Social Security Act, we have been cited to no requirement in chapter 440 that a JCC is bound by the [grant or] denial of a claim for social security disability benefits. The legislature could have easily included such a requirement when chapter 440 was substantially amended as a result of chapter 93-415, Laws of Florida, but it did not do so. Furthermore, given the fact that the evidence may vary between a workers' compensation proceeding and a proceeding on a claim for social security disability benefits through no fault of the claimant, it would be unjust to review federal disability

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still has "burden of proving entitlement to PTD benefits" and could not rely "solely on fact that he had been awarded social security disability benefits to prove that he was permanently totally disabled").

> determinations as carrying binding precedential authority in a proceeding under chapter 440, Florida Statutes.

Id. at 756-757.

Evaluating credibility of witnesses, conflicts of evidence, weight to be given testimony, physical evidence, and expertise, all to determine where the preponderance lies is no small task. Those charged with doing so ought not be tempted to abdicate the responsibility to the conclusions of another. Traditionally the temptation has been disallowed. On a retrial, the jury is not told the verdict of the first jury; an investigator, appearing as a trial witness, is rarely permitted to testify that he or she believes one side or another has the better case. *See e.g.*, 1 John W. Strong *et al.*, *McCormick on Evidence* §12 at 51 (5th ed. 1999) (opinions on the ultimate

issue); *Warren Petroleum Co. v. Thomasson*, 268 F.2d 5 (5th Cir. 1959).

It appears that Florida has a different idea. In that enlightened jurisdiction Scott can assist the JCC in determining PTD benefits by putting in evidence the findings of the ALJ, another factfinding in another tribunal. What the ALJ does with its findings does not "cost" Fleetwood and Crawford anything. It is what the State of Florida allows the JCC, in the state proceeding, to do with those findings that concerns them.

In this issue of first impression, Fleetwood and Crawford seek from our court an unprecedented broad order, revamping social security hearings, transforming a non-adversarial, inquisitorial system, established by Congress under federal law to determine eligibility for disability benefits. Even if we had the power to do so, we respectfully decline. If

there is any relief to be found by Fleetwood and Crawford at all, their remedy lies, not at the federal judicial or legislative level, but at the state level, in the reform of the Florida Workers' Compensation Law by the Florida Legislature.

VI. CONCLUSION

The decision of the district court is REVERSED.

(SEAL [Filing of Motion])
98 NOV-9 PM
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CRAWFORD & COMPANY and
FLEETWOOD HOMES OF FLORIDA,

Petitioners,

CASE NO.
98-65-CIV-ORL-18C

vs.

KENNETH S. APFEL, Commissioner
of Social Security,

Respondent.
_____/

Final Judgment
Petitioners are proper parties.
GRANTED and SO ORDERED this
30th day of Nov., 1998.

s/_____
G. KENDALL SHARP
United States District Judge

(SEAL [Filing of Judgment])
98 DEC-1 AM
CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

MOTION FOR ENTRY OF FINAL JUDGMENT

COME NOW, Petitioners, Crawford & Company and Fleetwood Homes of

Florida, and move this Honorable Court to enter a final Judgment declaring Petitioners proper parties and requiring the Administrative Law Judge to institute a rehearing, and in support thereof state as follows:

1. On January 9, 1996, Crawford and Company and Fleetwood Homes (Petitioners) filed a Motion to Intervene in the social security claim filed by Debra D. Scott in Tampa, Florida.

2. On July 11, 1996, the presiding Administrative Law Judge, G. Marvin Bober, entered an Order denying Petitioners' Motion to Intervene.

3. Petitioners filed a Petition for Review with the United States District Court, Middle District of Florida, Orlando Division, on August 9, 1996.

4. On August 18, 1997, the presiding United States Magistrate Judge, James G. Glazebrook, entered a

Report and Recommendation, recommending the action be dismissed without prejudice for lack of jurisdiction as there was no final order. Judge Glazebrook held that a decision is not final until the movant has obtained a decision from the Appeals Council. The Appeals Council had not yet ruled on petitioners request for review of Judge Bober's decision and consequently, Judge Glazebrook found that the Commissioner had not rendered a final decision.

5. Petitioners filed an Objection to the Report and Recommendation which was treated as a Motion for Reconsideration per the August 18, 1997 Order. The presiding United States Magistrate Judge, James G. Glazebrook, entered an Order on September 15, 1997, holding that without Appeals Council review of the Administrative Law Judge's decision, no final decision of the Commissioner

exists which would be subject to District Court review. The September 15, 1997 Order permitted Petitioners to exhaust their administrative remedies by seeking the Appeals Council review.

6. On December 30, 1997, the presiding Administrative Appeals Judge, John W. Wojciechowski, entered an order dismissing the Petitioners' request for review under 20 C.F.R. 404.967 and 416.1467 on the grounds that Petitioners were not proper parties.

7. On January 23, 1998, Petitioners filed a Petition for Review with this Court.

8. On March 26, 1998, Kenneth S. Apfel, Commissioner of Social Security (Respondent), filed a Motion to Dismiss Petitioners' Petition for Review.

9. On April 21, 1998, Petitioners filed an opposition to Respondent's

Motion to Dismiss.

10. On June 15, 1998, Judge Glazebrook granted the Motion to Dismiss, reasoning that 42 U.S.C. Section 405(g) limited judicial review to "individuals", and not corporations.

11. On June 26, 1998, Petitioners filed a Memorandum of Law in Opposition to the Report and Recommendation, which was treated as a Motion for Rehearing, to the United States District Court, Middle District of Florida, Orlando Division.

12. Petitioners maintained that Judge Glazebrook's ruling was in error. Petitioners contended that Judge Glazebrook erred in his determination that Petitioner, Fleetwood Homes, was a corporation, and not an individual, and thus was not a proper party to this action.

13. Petitioners emphasized that Judge Glazebrook's ruling was

contrary to the United States Supreme Court holding which states that judicial review under Section 405(g) is not limited to "individuals" per se. Califano v. Yamasaki, 99 S.CT. 2545 (1979). See also, Attorney Registration and Disciplinary Commissioner of the Supreme Court of Illinois v. Richard S. Schweiker, 715 F.2d 282 (7th Circuit, 1983) and Avery v. Heckler, 584 F.Supp. 312 (U.S.D.C. Mass, 1984).

14. After receiving Petitioners' Motion for Rehearing, U.S. District Judge Kendall G. Sharp, on July 9, 1998, rejected U.S. Magistrate Judge Glazebrook's Report and Recommendation. Judge Sharp found that Petitioners were proper parties and therefore had subject matter jurisdiction.

15. A status conference was subsequently held on October 19, 1998. During the status conference, the

parties agreed that no substantive issues remain for determination by the Magistrate Judge. Accordingly, Judge Glazebrook ordered that Petitioners may file and serve a Motion for Entry of Final Judgment.

WHEREFORE, for the foregoing reasons, Petitioners move this Court to enter a Final Judgment declaring Petitioners to be proper parties to Debra Scott's Social Security claim. Petitioners further move this Court to require the Administrative Law Judge to institute a rehearing allowing Petitioners to intervene in Scott's social security claim.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 9th day of November, 1998 to I. Randall Gold, Assistant U.S. Attorney, 201 Federal Building, 80 North Hughey Avenue, Orlando, FL, and to Karen Aviles, Office of General Counsel, 6401

Security Blvd., Room 611, Almeir Building, Baltimore, MA 21235.

s/_____

Derrick E. Cox, Esquire
Florida Bar No.: 0858153
HURLEY, ROGNER, MILLER, COX & WARANCH, P.A.
200 South Orange Avenue
SunTrust Tower, 20th Floor
Orlando, FL 32801
(407) 422-1455
Attorney for Petitioners

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(SEAL [Filing of Report])
FILED
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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CRAWFORD & COMPANY, and
FLEETWOOD HOMES OF FLORIDA,

Plaintiff,

vs. Case No.
98-65-CIV-ORL-18C

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.
_____/

The recommendation is rejected.
The Court finds that Plaintiffs are proper parties and therefore have subject matter jurisdiction.
9 July 98
s/_____
G. KENDALL SHARP
U.S. DISTRICT JUDGE

(SEAL [Filing of Judgment])
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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

REPORT AND RECOMMENDATION

This cause came on for oral argument on June 9, 1998 on the

following motion:

MOTION: MOTION TO DISMISS PETITION [Docket No. 6]

FILED: March 26, 1998

RECOMMENDATION: GRANTED for lack of subject matter jurisdiction

I. The Facts and Procedural History

Petitioners Crawford & Company and Fleetwood Homes of Florida ["petitioners"] appeal pursuant to 42 U.S.C. §405(g) from a final decision of the Commissioner of Social Security ["the Commissioner"] denying their motion to intervene as parties to an administrative hearing regarding whether Debra Scott was entitled to social security disability benefits. *See* Docket Nos. 6-7, 10, Debra Scott is the former employee of Fleetwood Homes of Florida ["Fleetwood"], a self-insured employer. Crawford & Co. is Fleetwood's servicing agent.

In 1994, Scott injured her leg during the course of her employment.

That same year, Scott applied to the social security administration for supplemental social security benefits on the grounds that she was disabled. In 1995, Scott also applied to Crawford & Co. for permanent total disability benefits under Florida's worker's compensation laws, Fla.Stat. §440.15, claiming to have suffered a "catastrophic injury" while on the job. Under Florida Law, only a catastrophic injury constitutes permanent total disability. *See* Fla.Stat. §440.15(1)(b). A "catastrophic" injury may include injury severe enough to qualify for social security disability benefits. *See* Fla.Stat. §440.02(34)(f). On December 30, 1997, the Appeals Council issued an Order dismissing petitioners' request for review of the ALJ's order denying petitioners' motion to intervene in Scott's social security hearing. *See also Crawford &*

Co. and Fleetwood Homes of Florida v. Apfel, Case No. 95-466-CV-18C (prior remand for lack of jurisdiction for failure to exhaust administrative remedies).

Crawford & Co. and Fleetwood claim that the Commissioner should have allowed them to intervene as parties to the entitlement hearing because a social security determination favorable to Scott will adversely affect them. Crawford & Co. and Fleetwood are potentially liable for payments to Scott under Florida workers' compensation laws. Petitioners are concerned that the Florida Judge of Compensation Claims (JCC) will be bound by, or otherwise defer to, the Commissioner's determination of disability.[1]

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[1] There is no indication from the record that the Florida Judge of Compensation Claims is bound to follow the determination of the Commissioner, or that the JCC will not allow petitioners the opportunity to present their evidence in

II. The Law and its Application

Petitioners assert that this Court has subject matter jurisdiction pursuant to 42 U.S.C. §405(g) to review the final decision of the Commissioner determining that petitioners' were not proper parties to the social security disability hearing of Debra Scott. Section 405(g), 42 U.S.C., provides, in relevant part, as follows:

> (g) Judicial review
>
> **Any individual**, after any final decision of the Commissioner of Social Security made after a hearing **to which he was a party**, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social

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the state workers' compensation proceedings.

Security may allow.

42 U.S.C. §405(g) (emphasis supplied). Petitioners are corporations, not individuals. Congress has taken great care to specifically name each individual who may seek an administrative determination of entitlement to disability benefits. Section 405(b)(1) provides as follows:

> Upon request by **any such individual** or **upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision** the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the

> hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision.

42 U.S.C. §405(b)(1) (emphasis supplied).

Because Congress limited benefit determinations to individuals, *see* 42 U.S.C. §405(b)(1), Congress had no need to allow anyone other than an individual to seek judicial review of the Commissioner's final decision. Thus, Congress limited judical review to "any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . ." 42 U.S.C. §405(g). Congress did not allow corporations to seek judicial review from the Commissioner's decision that they are not proper parties to a hearing because Congress envisioned only listed inviduals as requesting, or intervening in, hearings. Accordingly, this Court lacks

jurisdiction to hear petitioners' appeal under 42 U.S.C. §405(g).

Congress has given the Commissioner full power and authority to make regulations and establish procedures not inconsistent with the statute, which are necessary or appropriate to carry out the statute. *See* 42 U.S.C. 405(a). Pursuant to his authority, the Commissioner has promulgated regulations establishing who may request a hearing and who may be a party to a hearing. *See* 20 C.F.R. §§404.932(a)-(b), 416.1432(a)-(b). According to the regulations, the following may be parties to a hearing:

> After a request for a hearing is made, you, the other parties to the initial, reconsidered, or revised determination, **and any other person who shows in writing that his or her rights may be adversely affected by the hearing**, are parties to the hearing. In addition, any

> other person may be made a party to the hearing if his or her rights may be adversely affected by the decision, and the administrative law judge notifies the person to appear at the hearing or to present evidence supporting his or her interest.

20 C.F.R. §§404.932(b), 416.1432(b) (emphasis supplied).

Crawford & Co. and Fleetwood are correct that the Commissioner has worded his regulation more broadly than 42 U.S.C. §405(b)(1) by using the word "person" instead of "individual." Nevertheless, the Commissioner has interpreted the words "any other person who shows in writing that his or her rights may be adversely affected by the hearing" in these regulations as being limited to any other person who may request a hearing under 42 U.S.C. 405(b)(1). Under the Commissioner's interpretation, only a "wife, divorced wife, widow, surviving

divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes [such] a showing in writing" may be a party to a hearing under 20 C.F.R. §§404.932(b), 416.1432(b). *See* Docket Nos. 6 at 8; 7 at 3 ¶3 (Waxman Declaration); *see also* 42 U.S.C. §405(b)(1).

A district court normally defers to an agency's reasonable interpretation of its own regulations. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (courts have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer); *accord, Jamerson v. Chater*, 112 F.3d 1064, 1065-66 (oth Cir. 1997); *Nelson v. Apfel*, 131 F.3d 1228, 1234-35 (7th Cir. 1997). A

district court will not defer, however, if the agency's interpretation is manifestly contrary to the statutory standard that the regulations purport to implement. *See Sullivan v. Zebley*, 493 U.S. 521, 528, 541 (1990). The Commissioner's interpretation of 20 C.F.R. §§404.932(b) and 416.1432(b) is reasonable and thoroughly consistent with the provisions of the statute. The Commissioner's interpretation is also consistent with Congress's decision to limit judicial review under 42 U.S.C. §405(g) to "individuals" who were made a "party" to the hearing.

III. Conclusion

For the reasons stated above, the Court **RECOMMENDS** that the motion to dismiss for lack of jurisdiction be **GRANTED**, and the case be closed. Failure to file written objections to the proposed findings and

recommendations in this report pursuant to 28 U.S.C. §636(b)(1) and Local Rule 6.02 within ten days of the date of its filing shall bar an aggrieved party from a *de novo* determination by the district court of issues covered in the report, and shall bar an aggrieved party from attacking the factual findings on appeal.

DONE AND ORDERED this 15th day of June, 1998.

s/_____
James G. Glazebrook
United States Magistrate Judge

The Court Requests that the Clerk of Court Mail or Deliver Copies of this Order to All Counsel of Record and Pro Se Litigants, and to the Honorable G. Kendall Sharp.

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

In the case of **Claim for**

Deborah D. Scott
(Claimant)

Period of Disability
Disability Insurance Benefits
Supplemental Security Income

(Wage Earner)
(Leave blank if same as above)

266-77-3454
(Social Security Number)

This case is before the Appeals Council on a request, filed by Crawford and Company/Fleetwood Homes of Florida, for review of the Administrative Law Judge's decision, dated October 11, 1996. The United States District Court, Middle District of Florida, Orlando Division (Civil Action No. 96-874-CIV-ORL-018), has directed that the Appeals Council consider this request in accordance with 20 CFR 404.967 (and 416.1467).

The Appeals Council has ascertained that Crawford and Company/Fleetwood Homes of Florida was not a party to the Administrative Law Judge's decision in this case (20 CFR 404.932 and 416.1432); is not an appointed representative of the claimant; and

that their rights with respect to benefits were not adversely affected by the Administrative Law Judge's decision and would not be adversely affected by any decision the Council might make. In this regard, the Administrative Law Judge has issued an order on July 11, 1996, denying the request from Crawford and Company/Fleetwood Homes of Florida to be made a party in the claimant's hearing proceedings.

Sections 205(a) and (b)(1) and 1631(c)(1)(A) of the Social Security Act describe when applicants and other parties are entitled to a hearing but this is only with respect to their rights to benefits under Titles II and XVI. Further, as provided in 20 CFR 422.140, any party may have rights for a hearing but only with respect to determinations on their entitlement to monthly benefits or other rights under Title II of the Act. Also, 20 CFR 422.203 states that the right for any party to request a hearing flows only from reconsideration determinations involving their rights under Title II or XVI. In this case, Crawford and Company/Fleetwood Homes of Florida has not claimed any benefits or other rights provided under Title II or XVI of the Act and has not established that such rights would be adversely affected.

Accordingly, the request for review filed by Crawford and Company/Fleetwood Homes of Florida is hereby dismissed under 20 CFR 404.967 and 416.1467 because they are not a proper party.

Notice of this action is hereby given by mailing a copy to the claimant, her representative and to the person filing the request for review on behalf of Crawford and Company/Fleetwood Homes of Florida.

APPEALS COUNCIL

original signed by
John W. Wojciechowski
Administrative Appeals Judge

Date: DEC 30 1997

Name and Address of
Person Filing Request for Review:
Derrick E. Cox, Esq.
Hurley and Rogner, P.A.
201 South Orange Avenue, #640
Orlando, FL 32801

(SEAL)
FILED
97 AUG 19 AM 9:24
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CRAWFORD & COMPANY AND
FLEETWOOD HOMES OF FLORIDA,

Plaintiffs,

-vs-

Case No.
96-874-CIV-ORL-18

JOHN J. CALLAHAN, Acting
Commissioenr of Social Security,

Defendant.

_____/

REPORT AND RECOMMENDATION

This cause came on for hearing on August 14, 1997 on Final Hearing and Oral Argument. Thereon it is RECOMMENDED that this action be dismissed for lack of subject matter jurisdiction.[1] *See* Fed.R.Civ.P.

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[1] While the parties agreed that remand would be proper, this Court cannot remand an action over which it does not properly have subject matter jurisdiction. This

12(h)(3).

On June 19, 1994, Deborah D. Scott injured her leg during the course of her employment with Fleetwood Homes of Florida, Inc. ["Fleetwood"]. *See* Docket No. 17 at 3. Scott filed a request for assistance with the Florida Division of Workers' Copmpensation on November 3, 1997. *See* Docket No. 17 at 3. Additionally, Scott filed a claim for Supplemental Security Income benefits alleging that she was totally disabled. *Id.* The Social Security Administration initially denied Scott's request. *Id.* Scott subsequently requested reconsideration and the Administration affirmed its denial on July 6, 1995. *Id.* Therefore, on July 17, 1995, Scott requested a hearing by an administrative law judge ["ALJ"]. *See*

Court need not now determine whether this Court will have jurisdiction over a post-exhaustion appeal by Crawford & Company and Fleetwood.

Docket No. 17 at 4.

Prior to the disability hearing on Scott's claim, Fleetwood Homes of Florida (Scott's employer) and Crawford & Company (Fleetwood's third-party administrator for claims under the Florida workers' compensation statute) filed a motion to appear as a party to the hearing as permitted by 20 C.F.R. §404.932(b). *See* Docket Nos. 17 at 4, 18 at 1. Fleetwood and Crawford & Company argued that a determination by the Commissioner that Scott was entitled to disability benefits would adversely affect them in the workers' compensation proceedings. *See* Docket No. 17 at 4; *see also* §440.02(34). On July 11, 1996, The Honorable G. Marvin Bober, Administrative Law Judge, denied the requests of Fleetwood and Crawford & Company to appear as parties to the hearing. *See* Docket No. 17 at 4. On August 11, 1996, Fleetwood and

Crawford & Company filed this action pursuant to 42 U.S.C. §405(g) challenging Judge Bober's denial of their request to intervene. *See* Docket No. 1. Four days later, on August 15, 1996, Fleetwood and Crawford & Company mailed a letter to the Appeals Council requesting review of Judge Bober's decision.[2] As of the date of the hearing, the Appeals Council has not issued any decision regarding plaintiffs' appeal.

The Court's jurisdiction to review decisions by the Commissioner of Social Security ["Commissioner"] is governed by 42 U.S.C. §405(g), which provides, in pertinent part:

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[2] Fleetwood and Crawford & Company filed the letter at the hearing as Ex. 1, but did not attach it to any paper prior to the hearing. Therefore, prior to the hearing, the Court was unaware that plaintiffs had actually requested review by the Appeals Council. In the letter to the Appeals Council, mailed *after* filing this action, plaintiffs sought advice "whether this is the type of decision which the Appeals Council may properly review."

> [a]ny *individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party,* irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia . . . . Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

See 42 U.S.C. §405(g) (emphasis added). This Court's jurisdiction is thus limited to final decisions of the Commissioner, unless the appellant

presents a colorable constitutional issue. *See Brown v. Sullivan*, 921 F.2d 1233, 1237 (11th Cir. 1991). Only after an individual[3] has proceeded through all steps of the administrative process, including review by the Appeals Council, may an individual seek judicial review in the district court. *See Bowen v. City of New York*, 106 S.Ct. 2022, 2026 (1986). Therefore, a decision is not "final" until the movant has obtained a decision from the Appeals Council. *See Stone v. Heckler*, 778 F.2d 645 (11th Cir. 1985); *Ryan v. Bentsen*, 12 F.3d 245 (D.C. Cir. 1993). *See also, Bowen*, 106 S.Ct. at 2027 (individual may seek review by district court pursuant to 42 U.S.C. §405(g) only after following all of the steps of

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[3]. Crawford & Company and Fleetwood Homes of Florida have not briefed the issue of whether they are "individuals" within the meaning of 42 U.S.C. §405(g). *See e.g.*, 20 C.F.R. 422.210.

the administrative procedure, including seeking review by Appeals Council); 20 C.F.$. §422.210.

Because the Appeals Council has not yet ruled upon plaintiffs' request for review of Judge Bober's decision, the Commissioner has not rendered a final decision. Therefore, this Court lacks subject matter jurisdiction and the action must be dismissed. *See* 42 U.S.C. §405(g); Fed.R.Civ.P. 12(h)(3). Accordingly, it is

RECOMMENDED that this action be DISMISSED without prejudice for lack of jurisdiction given that there is no final decision by the Commissioner. Failure to file written objections to the proposed findings and recommendations in this report pursuant to 28 U.S.C. §636(b)(1) and Local Rule 6.02 within eleven days of the date of its filing shall bar an aggrieved party from a de novo determination by the district court of

issues covered in the report, and shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully submitted this 18th day of August, 1997.

s/_____
James G. Glazebrook
United States Magistrate Judge

Copies to: The Hon. G. Kendall Sharp
Counsel of Record.

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

IN THE CASE OF	CLAIM FOR
	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
Deborah D. Scott	
(Wage Earner)	266-77-3454 (Social Security Number)

ORDER

Crawford & Company and Fleetwood Homes of Florida, hereinafter referred to as employer, filed a motion to intervene in this proceeding, as well as a memorandum of law in support thereof. Claimant, through counsel, filed a reply.

Employer relies upon 20 CFR 404.932(b) to give it standing in this Social Security disability proceeding. This Regulation provides that after a request for rehearing is made by claimant "any other person who shows in writing that his or her rights may be adversely affected by the hearing, are parties to the hearing."

The threshold question to be resolved is whether the employer "may be adversely affected" (i.e. has

standing). Use of Federal Rules of Civil Procedure 24 which concerns intervention in federal civil litigation is appropriate to resolve intervention in federal administrative litigation.

A party seeking to intervene under Rule 24(b)(2) must show that its application is timely and, as pertinent to this discussion, its claim or defense and the main action has a question or law or fact in common. Chiles v. Thornburgh, 865 Fed 1197 (11th Cir. 1989); Purcell v. BankAtlantic Financial Corporation, 1996 WL 309093 (11th Cir. (FLA)).

The employer's rationale for intervention is that under the Florida Workers' Compensation Statute (Section 440.02(34)(f)(1994), a catastrophic injury as defined therein includes any injury which would qualify an employee to receive disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act (Act). Applying the Rule 24 test to the employer's rationale, employer's motion must fail.

The employer has no interest in the Social Security Case. It will have an opportunity to protect its interest in the State Workers' Compensation claim.

Moreover, as to the question of whether the employer's claim or defense and the main action has a question of law or fact in common, the short answer is negative.

Employer argues that where an injured employee files both a workers' compensation claim and a Title II, Title XVI or a concurrent application under the Act, and is found to be totally disabled under the Act, Judges of Compensation Claims (JCC) are required under Florida statute to consider a decision issued pursuant to the Act by an Administrative Law Judge (Judge). As such, employer claims its interest in the State workers' compensation case may be adversely affected by the Judges' decision in the Social Security disability case.

In my opinion this reasoning is misplaced. First, it is not mandatory for a JCC to consider a Judge's Social Security decision. It is merely discretionary. Thus, the outcome of the disability case is not legally binding or necessarily even considered in the State workers' compensation proceeding.

Entitlement to coverage under the Act is dissimilar to coverage under the State workers' compensation statute. Under the Act, in order for a claimant

to prevail, disability must be total. In contrast under the State statute disability may be permanent or temporary, permanent or partial. Thus, it is possible to be covered under the State provisions, and at the same time, not be entitled to benefits under the Act.

In essence, the employer is seeking two bites of the disability kiwi fruit. Protection of its interest in the State action is its sole remedy. Thus, I find that denying its motion for intervention does not adversely affect such interest.

Indeed argumendo, I found in favor of the employer, the next issue to be addressed is whether claimant's privilege to have her medical records kept confidential would be violated. Section 455.241(2) of the Florida Statutes provides, in pertinent part, that medical records may not be furnished to and the medical condition of a patient may not be discussed with any person other than the patient or patient's legal representative or other health care providers involved in the care and treatment of the patient, except upon written authorization of the patient. There are other exceptions to the disclosure rules, but they are inapplicable to this situation.

In my opinion, the confidentiality of claimant's medical records will be breached by employer's tender of such medical records for introduction in a Social Security disability case. Furthermore, Florida law precludes employer's attempt to introduce claimant's medical records into such a proceeding without her authorization. Generally, Acosta v. Rechter, 671 So.2d 149 (FLA. 1996). Public policy should preclude the employer from manipulating the adjudicative process. Porter v. Chater, 895 F.Supp. 1427 (D.Kan 1995).

In light of the foregoing, I conclude that employer's interest will be adequately protected in the State Workers' compensation claim, and its participation in the Social Security case is barred. Granting the motion to intervene will not permit it to prevail, as Florida law extends privilege status to a patient's medical records.

It is ORDERED that the motion to intervene is DENIED.

s/_____
G. Marvin Bober
Administrative Law Judge

July 11, 1996
Date

42 U.S.C. 405(b)(1) provides:

(b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsideration of disability benefit terminations; subsequent applications

(1) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing

with respect to such decision, and if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

42 U.S.C. 405(g) provides:

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a

review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who

was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action

in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extend provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

Supreme Court, U.S.
FILED
JUL 19 2001
OFFICE OF THE CLERK

No. 00-1669

In the Supreme Court of the United States

FLEETWOOD HOMES OF FLORIDA AND CRAWFORD & COMPANY, PETITIONERS

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Social Security Act, 42 U.S.C. 405(b)(1), and the Commissioner of Social Security's regulations, 20 C.F.R. 404.932(b), 416.1432(b), require that a disability claimant's employer and the employer's disability insurance carrier be permitted to intervene as parties in Social Security benefits determinations before the Social Security Administration.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, at 1-35) is reported at 235 F.3d 1298. The judgment and order of the district court (Pet. App. B, at 1) is unreported, as are the district court's clarification order (App., *infra*, 1), and the report and recommendation of the magistrate judge (Pet. App. B, at 1-12).[1] The order

[1] Although Appendix B to the petition for a writ of certiorari contains the judgment of the district court, the recommendations and reports of the magistrate judge, and decisions of the Social Security Administration's Appeals Council, those documents are each paginated separately, beginning with page 1. As a result, there are, for example, four page fives in Appendix B, each in a separate decision. Accordingly, when citing Appendix B, we will

of the Social Security Administration's Appeals Council and that of the administrative law judge (App. B, at 1-3; App. B, at 1-5) are also unreported.

JURISDICTION

The opinion of the court of appeals was filed on December 14, 2000. The petition for a writ of certiorari was filed on March 8, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, provides old-age, survivor, and disability benefits for insured individuals. Under 42 U.S.C. 405(b)(1), the Commissioner of Social Security must "make findings of fact, and decisions as to the rights of any individual applying for a payment." If there is a decision "which involves a determination of disability and which is in whole or in part unfavorable to such individual," then "[u]pon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision." *Ibid.*

Although many systems of agency adjudication follow the judicial model of adversarial presentation, the

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attempt to identify which opinion or decision we are citing, unless context makes the opinion's identity obvious.

Social Security Act is not administered under that model. *Sims* v. *Apfel*, 530 U.S. 103, 110 (2000) (plurality opinion) (citing 2 K. Davis & R. Pierce, *Administrative Law Treatise* 103 (3d ed. 1994); B. Schwartz, *Administrative Law* 469-470 (4th ed. 1994)); *id.* at 117 (Breyer, J., dissenting) (noting "the nonadversarial nature of" Social Security Administration proceedings). "Social Security proceedings are inquisitorial rather than adversarial," and Administrative Law Judges (ALJs) have a "duty to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 110-111 (plurality opinion). The Commissioner's regulations, issued pursuant to 42 U.S.C. 405(a), similarly provide that the Social Security Administration (SSA) must "conduct the administrative review process in an informal, nonadversary manner." 20 C.F.R. 404.900(b). Consistent with that policy, the Commissioner has no attorney or other representative who opposes a benefits request before an ALJ. *Sims*, 530 U.S. at 111 (plurality opinion).

The Commissioner's regulations also address who may request a hearing and who may be a party to a hearing. See 20 C.F.R. 404.932, 416.1432. Under the regulations, an applicant "may request a hearing if a hearing is available under § 404.930. In addition, a person who shows in writing that his or her rights may be adversely affected by the decision may request a hearing." 20 C.F.R. 404.932(a), 416.1432(a). The applicant, "the other parties to the initial, reconsidered, or revised determination, and any other person who shows in writing that his or her rights may be adversely affected by the hearing, are parties to the hearing. In addition, any other person may be made a party to the hearing if his or her rights may be adversely affected by the decision, and the administra-

tive law judge notifies the person to appear at the hearing or to present evidence supporting his or her interest." 20 C.F.R. 404.932(b), 416.1432(b).

2. In 1994, Deborah D. Scott was injured on the job while employed by petitioner, Fleetwood Homes of Florida. Pet. App. A, at 3. In 1995, Scott filed an application for federal Social Security disability insurance benefits (and an application for Supplemental Security Income benefits which was denied). *Id.* at 3-4. She also filed a claim in Florida for workers' compensation; in that claim, she sought permanent total disability (PTD) benefits under state workers' compensation law. *Id.* at 4.

In 1996, petitioner Fleetwood and its workers' compensation insurance carrier, petitioner Crawford & Company, Inc., filed a motion to intervene in administrative proceedings on Scott's federal Social Security disability claim, which was then pending before an ALJ. Pet. App. A, at 4. Petitioners claimed that their rights could be "adversely affected" by the decision of the ALJ even though the federal government pays Social Security disability insurance benefits awards. Petitioners noted that they would have to pay Scott permanent total disability benefits if such benefits were awarded under Florida workers' compensation law. Florida law, petitioners further explained, limits permanent total disability benefits awards to cases of "catastrophic injury," and defines catastrophic injury by reference to standards established under Title II of the Social Security Act.[2] Were the ALJ to make a

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[2] Florida's Workers' Compensation Law, Fla. Stat. Ann. §§ 440 *et seq.* (West Supp. 2001), provides that "[o]nly a catastrophic injury as defined in s. 440.02 shall, in the absence of conclusive

finding of "catastrophic injury," they contended, the Florida Judge of Compensation Claims (JCC) might rely on that ruling to support an award of PTD benefits in favor of Scott—and against them—in state proceedings. *Id.* at 5.

The ALJ denied the motion to intervene. Pet. App. A, at 6; Pet. App. B (ALJ Dec.), at 2. Petitioners then sought review of the ALJ's decision before the Appeals Council of the SSA, which likewise concluded that petitioners were not entitled to intervene. The Appeals Council noted that (1) petitioners were not Scott's appointed representatives; (2) with respect to benefits, petitioners' rights were not adversely affected by the decision of the ALJ; (3) they were not parties to the ALJ decision; and (4) they would not be adversely affected by any decision the Appeals Council might make. Pet. App. B (Appeals Council Dec.), at 1-2. The Appeals Council also explained that the Social Security Act specifies when applicants and other parties are entitled to a hearing with respect to their rights under Titles II and XVI of the Social Security Act. In this case, petitioners had "not claimed any benefits or other

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proof of a substantial earning capacity, constitute permanent total disability. Only claimants with catastrophic injuries are eligible for permanent total disability. In no other case may permanent total disability be awarded." Fla. Stat. Ann. § 440.15(1)(b) (West Supp. 2001). Under Section 440.02(37)(f), "[c]atastrophic injury" is defined as "[a]ny other injury that would otherwise qualify under this chapter of a nature and severity that would qualify an employee to receive disability income benefits under Title II [42 U.S.C. 401 *et seq.*] * * * of the federal Social Security Act as the Social Security Act existed on July 1, 1992, without regard to any time limitations provided under that act." Fla. Stat. Ann. § 440.02(37)(f) (West Supp. 2001).

rights provided under Title II or XVI of the Act and ha[d] not established that such rights would be adversely affected." Pet. App. A, at 8; Pet. App. B (Appeals Council Dec.), at 2. Accordingly, the Appeals Council dismissed petitioners' request for review "because they [were] not a proper party" under the regulations. Pet. App. A, at 8; Pet. App. B (Appeals Council Dec.), at 3. See generally 20 C.F.R. 404.932, 416.1432.

3. a. Petitioners sought review in district court pursuant to 42 U.S.C. 405(g),[3] and the Commissioner moved to dismiss that action for lack of standing and lack of jurisdiction. Pet. App. A, at 9. On March 26, 1998, the magistrate judge issued a Report and Recommendation (Mar. 26 R&R) recommending that the motion be granted. See *ibid.*; Pet. App. B (Mar. 26 R&R), at 1-12. The magistrate judge explained that 42 U.S.C. 405(b)(1) directs the Commissioner to make findings of fact and decisions of law with respect to the rights of "any *individual applying for a payment* under this subchapter," and further provides for a hearing "[u]pon request by *any such individual* or *upon request by a wife, divorced wife*" or any other specified relative who makes a showing in writing that his or her rights may be prejudiced by any decision of the Commissioner of Social Security. Pet. App. B (Mar. 26 R&R), at 6.

Congress, the magistrate observed, "ha[d] taken great care to specifically name each individual who may seek an administrative determination," Pet. App. B

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[3] Section 405(g) provides in pertinent part: "Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action * * * . Such action shall be brought in the district court of the United States." 42 U.S.C. 405(g).

(Mar. 26 R&R), at 6, and had "limited benefit determinations to individuals," such as those (the applicant, his or her spouse, ex-spouse, parents, etc.) listed in the Act itself, *id.* at 7. Because the only persons entitled to request a benefits hearing were individuals, the magistrate reasoned, Congress "had no need to allow anyone other than an individual to seek judicial review of the Commissioner's final decision," and indeed Section 405(g) permits "any individual" to seek judicial review of a final decision made "after a hearing to which he was a party." *Ibid.* (quoting 42 U.S.C. 405(g)).

Turning to the Commissioner's regulations, the magistrate came to the same conclusion. The regulations specify that the applicant "and any other person who shows in writing that his or her rights may be adversely affected by the hearing" are considered parties to the hearing. Pet. App. B (Mar. 26 R&R), at 8. The magistrate acknowledged that the quoted passage could be read as broader than 42 U.S.C. 405(b)(1), because it uses the word "person" rather than "individual." Pet. App. B (Mar. 26 R&R), at 9. But the Commissioner had interpreted the phrase "any other person who shows in writing that his or her rights may be adversely affected" as a reference to the individuals specifically listed in Section 405(b)(1)—including spouses, ex-spouses, parents, etc.—who are entitled to a hearing if they show in writing that their rights under the Social Security Act will be adversely affected. *Id.* at 9-10. Thus, the magistrate explained, the Commissioner's interpretation of his own regulations would permit a "wife, divorced wife, widow, surviving divorced wife," etc. to seek a hearing or intervene, but would not allow a corporation or other unlisted individual to do so. *Ibid.* Because that construction was reasonable and consistent with the statute, the magis-

trate concluded that it is entitled to deference and should be upheld. *Id.* at 10-11.[4]

b. The district court rejected the magistrate's recommendation and report by a series of handwritten notations and brief orders concluding that petitioners are proper parties. Pet. App. A, at 11-12; App., *infra*, 1.

4. The court of appeals reversed. Pet. App. A, at 1-35. "Social security disability proceedings," the court observed, are "inquisitorial rather than adversarial." *Id.* at 22 (citing *Sims* v. *Apfel*, *supra*). The court explained that the SSA "has replaced normal adversary procedure with an investigatory model, where it is the duty of the ALJ to investigate the facts and develop the arguments both for and against granting benefits; review by the Appeals Council is similarly broad." *Ibid.* "The Commissioner has no representative before the ALJ to oppose the claim for benefits; neither is there any indication that he opposes claimants before the Appeals Council." *Id.* at 23. The non-adversarial model, the court stated, is also made "quite clear" by SSA regulations, which "expressly provide that the SSA 'conducts the administrative review process in an informal, nonadversary manner.'" *Id.* at 22-23 (quoting 20 C.F.R. 404.900(b)).

Petitioners' demand that they be permitted to intervene in an individual disability benefits case, in a posture adverse to the applicant, raised more than mere procedural concerns, the court of appeals ob-

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[4] The magistrate judge also noted that there was no indication in the record that (1) the Florida JCC would be bound to follow the determination of the Commissioner, or (2) the Florida JCC would not allow petitioners an opportunity to present their evidence in the state workers' compensation proceeding. Pet. App. B (Mar. 26 R&R), at 4 n.1; Pet. App. A, at 11.

served. Instead, it was a request for "an unprecedented broad order, revamping social security hearings, transforming a non-adversarial, inquisitorial system, established by Congress * * * to determine eligibility for disability benefits." Pet. App. A, at 34. Such a result, the court concluded, was not supported by the Act or the Commissioner's regulations. "Under the Act, the statutory provisions governing hearings in disability cases contemplate participation by only individuals with a stake in obtaining benefits." *Id.* at 25. Thus, the court stated, "[t]he statute speaks in terms of 'individuals applying for a payment,' 'his or her rights,' 'such individual or upon request by a wife, divorced wife, widow.'" *Id.* at 25-27 (quoting 42 U.S.C. 405(b)(1)). The court concluded that "[a]s corporate entities, it is clear that [petitioners] are not the individuals or specified persons enumerated by the Act or regulations with a potential stake in the award of social security benefits to a particular claimant," *id.* at 28-29, and that "[a]s a result, under the law, they are not proper parties to Scott's federal hearing." *Id.* at 29.

The court then turned to petitioners' justification for seeking intervention—the assertion that an award of Social Security disability benefits could influence the result of state workers' compensation proceedings in which petitioners have a financial interest. Pet. App. A, at 29. The court pointed out that, in this case, the ALJ's decision appeared not to have affected state proceedings. To the contrary, the JCC had "held that she had 'considered whether [Scott] has sustained a catastrophic injury which would entitle her to receive disability income benefits'" and "found that '[Scott's] injuries . . . are of such a nature and severity that they would qualify this Claimant to receive disability income benefits.'" *Id.* at 30. "In her opinion," the court

emphasized, "the JCC makes no reference to the prior decision of the ALJ to award benefits." *Ibid.* Thus, the court concluded, "[i]t appears clear from the record that the JCC applied social security standards yet made her own independent findings," and that such an approach "is in accordance with Florida case law." *Ibid.* See also *id.* at 32.

The court recognized that a federal ALJ's fact-findings apparently can be placed into the record of state proceedings to the extent they assist the JCC in making appropriate determinations. Pet. App. A, at 34. But that feature of state law, the court explained, could not justify a dramatic alteration in federal proceedings under the Social Security Act. "What the ALJ does with [his or her] findings," the court explained, "does not 'cost' [petitioners] anything. It is what the State of Florida allows the JCC, in the state proceeding, to do with those findings that concerns them." *Ibid.* As a result, the proper solution was not to "revamp[] social security hearings." *Ibid.* Instead, to the extent petitioners require relief, the court explained, their remedy lies "at the state level, in the reform of the Florida Workers' Compensation Law." *Id.* at 35.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioners continue to press their claim that, as a matter of law, the Social Security Administration was required to permit them to intervene in proceedings on Debra Scott's application for Social Security disability benefits. The court of appeals properly rejected that claim. As this Court and the court of appeals have both

observed, Social Security proceedings are fundamentally investigatory rather than adversarial in nature. See *Sims* v. *Apfel*, 530 U.S. 103, 110-111 (2000) (plurality opinion); *id.* at 117 (Breyer, J., dissenting); Pet. App. A, at 22-23. There is no representative of the Commissioner who seeks to defeat benefits claims, nor any counsel for the defense; instead, the proceeding is informal, and the Administrative Law Judge is expected to investigate the facts and develop the arguments on both sides. See *ibid.*; 20 C.F.R. 404.900(b) (SSA "conduct[s] the administrative review process in an informal, nonadversary manner."). Petitioners' demand, if granted, would fundamentally alter the nature of Social Security claims administration. As the court of appeals explained, permitting intervention by entities with interests under state law that are adverse to the beneficiary's would "revamp[] social security hearings, transforming [the] non-adversarial, inquisitorial system" established by Congress and the Commissioner's regulations into adversary proceedings. Pet. App. A, at 34. There is no justification for such an alteration in adjudicative processes where, as here, the entity seeking intervention has no direct financial interest in the award of benefits the beneficiary seeks from the Social Security Administration.

Nor is there support for that result in the text of the Social Security Act or the Commissioner's regulations. The Social Security Act directs the Commissioner "to make findings of fact, and decisions as to the rights *of any individual applying for a payment* under" the Act. 42 U.S.C. 405(b)(1) (emphasis added). The Act is then very specific about who may seek a hearing with respect to that determination. If the determination is "in whole or in part *unfavorable to such individual*," the Commissioner must offer a hearing "[u]pon request

by *any such individual* or upon request by a wife, divorced wife, widow, surviving divorced wife," or any other listed legal or biological relative of the applicant "who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered." *Ibid.* (emphasis added).

The Social Security Act thus does not provide entities like petitioners a right to seek a hearing on individual disability benefits determinations. To the contrary, corporate employers and insurers are not included in the extensive list of those entitled to seek a hearing under 42 U.S.C. 405(b). Instead, the Act limits the right to seek a hearing on an individual benefits determination to "individuals," which is most naturally understood as encompassing natural persons. More important, the persons listed in Section 405(b)(1), in addition to being natural persons, are also persons (relatives of the applicant, etc.) who might have a direct stake in the grant or denial of benefits to the claimant under the Social Security Act, because their own entitlement to benefits under the Act might be affected by SSA's decision on the principal claim. The Act itself therefore furnishes no support for petitioners' contention that corporations, which have no entitlement to receive Social Security benefits, may intervene in individual benefits determinations.

The Commissioner's regulations similarly belie petitioners' contention. As explained above, 42 U.S.C. 405(b)(1) provides a list of individuals entitled to seek an administrative hearing upon a "showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered." Echoing that language, the Commissioner's regulations provide that the applicant and any other "person who shows in writing that his or her rights may be ad-

versely affected by the decision may request a hearing," 20 C.F.R. 404.932(a), and "are parties to the hearing," 20 C.F.R. 404.932(b). As the magistrate judge pointed out (Pet. App. B (Mar. 26 R&R), at 9-10), the Commissioner has interpreted the phrase "any other person who shows in writing that his or her rights may be adversely affected by the hearing" in his regulations as "limited to any other person who may request a hearing under 42 U.S.C. 405(b)(1)," *e.g.*, a "wife, divorced wife, widow, surviving divorced wife," etc. That construction of the Commissioner's regulations is reasonable and thus is entitled to deference. See also *id.* at 10-11.

Petitioners, moreover, have failed to offer any compelling reason why they should have been permitted to intervene. As the court of appeals explained, the Florida Judge of Compensation Claims who handled the state proceedings did *not* rely on or even refer to the findings of the ALJ in this case. Pet. App. A, at 30-32.

2. Petitioners nonetheless argue (Pet. 6) that the court of appeals' decision conflicts with this Court's decision in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), and with the Seventh Circuit's decision in *Attorney Registration & Disciplinary Commission* v. *Schweiker*, 715 F.2d 282 (1983). Neither claim of conflict is correct.

Califano v. *Yamasaki* involved a class action, brought by Social Security beneficiaries under 42 U.S.C. 405(g), to challenge recoupment procedures under the Social Security Act. This Court held that Section 405(g)'s use of the word "individual" did not preclude aggrieved individuals from seeking relief through a class action. 442 U.S. at 698-703. Section 405(g), the Court explained, did not expressly prevent class relief, and by its terms did not purport to create an exception to the Federal Rules of Civil Procedure,

which authorize class actions. *Id.* at 700. Moreover, the court continued, many other statutes speak in terms of individual plaintiffs, but class relief has always been thought available with respect to them. *Ibid.*

Yamasaki, however, did not address who may intervene in agency proceedings under Section 405(b), much less hold that entities with no direct stake in an award of Social Security benefits may intervene to oppose the applicant's request. Instead, *Yamasaki* merely held that "individuals" (*i.e.*, natural persons) who are otherwise entitled to seek judicial review under Section 405(g) may utilize the class action mechanism provided by the Federal Rules of Civil Procedure. It thus nowhere suggests that corporations are "individuals" within the meaning of the Act, or that corporate employers and insurers with no direct stake in an award of disability insurance benefits under the Act may be deemed to be the "individual applying for a payment" of benefits or "a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father," etc. entitled to a hearing under Section 405(b)(1).

Petitioners' reliance on *Schweiker*, 715 F.2d at 289-290, is likewise misplaced. Like *Yamasaki*, *Schweiker* did not involve the effort of an employer or insurer to intervene in an individual employee's claim for benefits. Instead, in that case, the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois sought judicial review of an SSA ruling that was adverse to it, that was issued in response to its inquiry, and in which it had a direct financial interest. In particular, after the Disciplinary Commission had "paid $180,000 of its own money into the social security fund" to secure insurance for its employees, *id.* at 289, the SSA issued a blanket ruling that the Disciplinary Com-

mission's employees were not covered by the Social Security program. *Id.* at 288-289. Under those circumstances, the court of appeals concluded that the Commission could be considered an "individual" entitled to seek review of the SSA's decision under Section 405(g). "A company that paid premiums year in and year out for group life insurance for its employees and then was told by the insurance company that the policy was cancelled," the court stated, "would have standing to sue for a declaration that it was still in force." *Id.* at 289. And, absent an ability to seek review under Section 405(g), the Disciplinary Commission would be left "with no possible avenue of judicial review" of a ruling issued in response to its own requests. *Id.* at 290.

Here, in contrast, petitioners do not seek review of an administrative decision made with respect to them under the Act in response to their own submission. Instead they seek to intervene in an individual benefits proceeding initiated by another person before the SSA. Moreover, each of the considerations that led the court of appeals to permit the Disciplinary Commission to seek judicial review in *Schweiker* is absent here. While the appellant there had "a vital interest in knowing whether it ha[d] gotten anything for" its $180,000 "expenditure," 715 F.2d at 289, petitioners have no comparably direct pecuniary interest under the Act in the outcome of the proceeding. And unlike the appellant in *Schweiker*, petitioners cannot claim that they will have no opportunity to obtain judicial review if they ultimately are harmed by the ALJ's findings. If the ALJ's findings are relied upon in state workers' compensation proceedings—and thus far they have not —petitioners will have the opportunity to challenge any adverse effects of that reliance on judicial review in state court.

The Seventh Circuit's decision in *Schweiker*, furthermore, pre-dates this Court's decisions in *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), and *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), which cast doubt on the continuing significance of *Schweiker*'s reasoning, even in the fact-specific context in which it arose. Because the court of appeals in *Schweiker* construed 42 U.S.C. 405(h) as foreclosing judicial review through *any* means other than Section 405(g), 715 F.2d at 286-287, that court thought it necessary to do "some violence to the everyday meaning of 'individual'" in Section 405(g) to ensure that an entity with a direct stake in the controversy could obtain judicial review. *Id.* at 289-290. Three years after *Schweiker* was decided, however, *Michigan Academy* clarified that Section 405(h) does not necessarily foreclose judicial review under 28 U.S.C. 1331 *if* review cannot be obtained under Section 405(g) and the result would be a complete preclusion of judicial review. As this Court explained in *Illinois Council*, Section 405(h) demands the "'channeling' of virtually all legal attacks through the agency," 529 U.S. at 13, but it does not apply where the effect "would not simply channel review through the agency, but would mean no review at all" by any party at any time, *id.* at 19.

In any event, the extent or availability of administrative review for particular parties and particular issues is always a question of Congress's intent. *United States* v. *Fausto*, 484 U.S. 439 (1988); *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984). The Social Security Act nowhere evinces an intent to give employers a right to intervene in otherwise non-adversarial proceedings on an individual employee's application for disability benefits under the Act. For that reason, the

decision of the court of appeals does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RECEIVED
U.S. ATTORNEY
AUG 31 1998
MIDDLE DISTRICT OF FLORIDA
ORLANDO

CRAWFORD & COMPANY AND
FLEETWOOD HOMES OF FLORIDA,

Plaintiffs,

v.

KENNETH S. APFEL,
COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

granted
The oppty to respond
based on the memo in
Opposition to the Magistrate Rec
8/31/98

No. 98-65-Civ-Orl-18C

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98 AUG 31 PM 3:31
MIDDLE DISTRICT OF FLORIDA
ORLANDO

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98 AUG 31 AM 11:00
MIDDLE DISTRICT OF FLORIDA
ORLANDO

DEFENDANT'S MOTION TO CLARIFY

Defendant Kenneth S. Apfel, Commissioner of Social Security, his attorney, Charles R. Wilson, United States Attorney for the Middle District of Florida, Orlando Division, and I. Randall Gold, Assistant United States Attorney, hereby file this motion, pursuant to Fed.R.Civ.Pr. 7, to request the Court to clarify its July 9, 1998, rejection of the Magistrate Judge's Report and Recommendation in the above-captioned case.

On June 15, 1998, the Magistrate Judge issued a Report and Recommendation recommending that the Defendant's Motion to Dismiss Plaintiffs' Petition for Review for lack of jurisdiction be granted and the case be closed. In this decision, the Magistrate Judge found that the Social Security Act ("Act") and the Commissioner's regulations support the finding that the plaintiffs are not proper parties to an Administrative Law Judge ("ALJ") hearing, and that since they cannot be proper parties to an ALJ hearing, that this Court has no jurisdiction over their claim (See the Report and Recommendation).

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